

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. **76-1175**

STRASBURG REALTY, INC.,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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SECURITIES AND EXCHANGE COMMISSION, *et al.*,

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court for the Eastern Dist. of Va., Alexandria Division, dismissing the action filed by the petitioner in that Court for return of its business records and for abuse of the power of subpoena by the Securities and Exchange Commission and the State Corporation Commission of Virginia in refusing to return the business records of the petitioner for almost

six months. The individual members of the two Commissions were named as parties, as were the United States of America and the Commonwealth of Virginia.

OPINIONS BELOW

The opinion of the Court of Appeals of the Fourth Circuit, which is unreported, is set forth in the Appendix, page 1. The opinion or ruling of the District Court dismissing the action is set forth in the Appendix, page 2

JURISDICTION

The opinion of the Court of Appeals was filed on November 26, 1976. The jurisdiction of this Court is invoked under 28 USC §1254(1). The jurisdiction of the District Court was based upon 28 USC §§ 1331, 1343, 1346, 2674 and 42 USC §1983.

QUESTION PRESENTED

Whether the respondents, or any of them, acted unlawfully and are subject to suit for subpoenaing all books and records of the petitioner and holding all but a few of them continuously (except for one day) from August 29, 1974 to March 21, 1975, and to date have not returned all records subpoenaed.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution.

The Fifth Amendment to the United States Constitution.

The Fourteenth Amendment to the United States Constitution.

These provisions are set forth in the appendix, page

STATEMENT OF THE CASE

INTRODUCTION

This case raises the question of the right of the Securities and Exchange Commission (SEC) and the State Corporation Commission of Virginia (SCC) to use their subpoena power to obtain business records and refuse to return them for unreasonable periods of time. In this case the period of the retention was almost six months. The SEC and the SCC have a long history and practice of such action.

PROCEEDINGS

This action was originally filed in the United States District Court for the Eastern Dist. of Va., Alexandria Division. The jurisdiction in that Court was based upon 28 USC §§1331, 1343, 1346, 2647 and 42 USC §1983. Reliance was also placed upon *Bevins v. Six Unknown Federal Narcotics Agents*, 403 US 388, 29 L.Ed.2d 619, 91 S.Ct. 199 (1971). The District Court dismissed the action without a hearing on the merits. An appeal was taken to the United States Court of Appeals for the Fourth Circuit, and that Court affirmed the dismissal by the lower court on November 26, 1976.

FACTS

On August 29, 1974 the SCC issued a subpoena for virtually all books and records of the petitioner, although it had previously on three occasions spent three days reviewing them, having full access to the premises of the petitioner, and having been furnished copies of all requested documents at the expense of the petitioner. After the SCC obtained possession of the records it refused to return them, and the petitioner was unable to conduct its business. It was not until December 13, 1974, after numerous complaints, de-

mands and requests, that the SCC advised that certain day to day records were available, but that all other records were being retained until its investigation was closed (Appendix, page 5). On December 17, 1974 the corporate minute book and cancelled checks were returned to petitioner. Thereafter, the petitioner continued to make demands for the return of its records, and the SEC issued a subpoena for all of the records of petitioner. The SEC and the SCC were acting jointly in the investigation of the petitioner.

When the SEC issued its subpoena the SCC agreed to release the records in order that the petitioner could deliver the records to the SEC. The SEC subpoena was issued on December 31, 1974. The petitioner had possession of its records only one day before they were required to be delivered to the SEC. It was not until after this suit was filed below on March 21, 1975 that the SEC made any attempt to return to the petitioner its records, and some have never been returned. Several of the documents which have never been returned are legal documents of which the petitioner does not have a signed copy. The records not returned include contracts and a file of correspondence with the general public.

On July 25, 1975 the SEC filed an affidavit and represented in open court that it had returned to the petitioner all of its books and records. On August 5, 1975 the lower court entered an order for the SEC to return all records subpoenaed. Notwithstanding the affidavit previously filed, in response to the order the SEC did return a number of subpoenaed records. Still, however, the SEC failed to return all subpoenaed records. On October 24, 1975 the lower court ruled that the petitioner should file with the Court a list of records that had not been returned, and this was done. Thereafter, on March 5, 1976 the Court entered an

order dismissing the action on the basis that counter affidavits had been filed and all records had been returned. The Court was in error in regard to the counter affidavits as the petitioner had never filed an affidavit, as none was requested by the Court.

There was never any hearing on the merits of the action in the lower court.

ARGUMENT

There is no question but that the SEC and the SCC had the right to subpoena records for a legitimate investigation. However, they should not have the right to subpoena records for an improper purpose or to fail and refuse to return the subpoenaed records or fail and refuse to return them within a reasonable time after they are received. In the present case the period of retention by both the SEC and the SCC is on its face unreasonable—from August 1974 to March 1975 for most records, and some have never been returned. The subpoenaed records were in fact all business records of the petitioner, including check book and financial records, such that the petitioner could not conduct its business or its bills. The records were subpoenaed and produced for the SCC in Richmond, Virginia, over 100 miles from the office of the petitioner, and for the SEC in Arlington, Virginia, over 75 miles from the offices of the petitioner.

The period of retention by the SEC and the SCC of the records of the petitioner should be held to be an abuse of the subpoena power and a violation of the Fourth and Fifth Amendments of the Constitution providing for due process of law and prohibiting unreasonable searches and seizures. It should also be a violation of the Federal Civil Rights Acts, and the recent amendment to the Federal Tort Claims Act, 28 USC §2680(h).

The retention of the records was also a conversion and trespass to property. *Port Welcome Cruises, Inc. v. S.S. Bay Belle*, 215 F. Supp 76, affirmed *Humble Oil Refining Company v. S. S. Belle*, 324 F.2d 954 (4th Cir. 1963); *Eastern Lunatic Asylum v. Minerales y Metales, S.A.I.C.*, 331 F.2d 135 (5th Cir 1964); *Shapard v. Hynes*, 104 F. 449 (8th Cir. 1900).

The United States is not immune from suit for this action for the recovery of the petitioner's property wrongfully taken and held by the SEC. *United States v. State National Bank of Boston*, 96 US 30, 24 L.Ed. 647 (1887); *Trindal v. Wesley*, 167 US 204, 42 L.Ed. 137, 17 S.Ct. 790 (1896). *Virginia Coupon Cases (Poindexter v. Greenhow)*, 114 US 270, 29 L.Ed. 185, 5 S.Ct. 903 (1884); *United States v. Lee*, 106 US 196, 27 L.Ed. 173, 1 S.Ct. 240 (1882); *Bull v. United States*, 295 US 247, 79 L.Ed. 1412 (1934).

The SEC contends that it can not be sued *eo nomine*, relying upon such cases as *Holmes v. Eddy*, 341 F.2d 477 (4th Cir. 1965). However, other courts have taken a different view. See *Amos Treat & Co. v. SEC*, 306 F.2d 260 (DC 1962) and *R. A. Holmes & Co. v. SEC*, 299 F.2d 127 (1962).

The petitioner should be entitled to recover from the individual members of the Commissions, even if the members were acting in good faith. See *Tracy v. Swartwout*, 10 US 80, 91 L.Ed. 354 (1836); *United States v. Lee, supra*; *Bevins v. Six Unknown Federal Narcotics Agents*, 403 US 388, 29 L.Ed.2d 619, 91 S. Ct. 199 (1971); *Bull v. Hood*, 327 US 678, 90 L.Ed. 939, 66 S.Ct. 773 (1946).

It is, however, less important in this case as to who the proper defendant is as it is of the fact that the petitioner have a remedy to obtain the return of its records and that the petitioner be protected from the

wrongful acts by injunction and by damages. The SEC and the SCC have a long standing practice of utilizing their subpoena power to obtain records and then refusing to return them under the guise of their subpoena power. These activities of the SEC have a broad effect across the entire United States, and those of the SCC have their effect throughout the State of Virginia. These activities are special and important reasons for this Court to grant the petitioner's prayer for the writ of certiorari to review the matter. The rulings of the lower courts have sanctioned the activities of the SEC and the SCC and set an entirely unacceptable precedent for those governmental agencies to continue in their abuse of the subpoena. The issue of the lawfulness of the use of the subpoena power raises important issues of constitutional rights under the Fourth and Fifth Amendments of the Constitution that should be settled by this Court.

CONCLUSION

For the reasons stated, a writ of certiorari should be granted.

Respectfully submitted,

EDWARD DE V. BUNN

5707 Seminary Road
Bailey's Crossroads,
Virginia 22041

Attorney for Petitioner.

APPENDIX

1a

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 76-1385

Strasburg Realty, Inc.,

Appellant,

versus

Securities and Exchange Commission,
United States of America, State
Corporation Commission and
Commonwealth of Virginia,

Appellees.

Appeal from the United States District Court for the
Eastern District of Virginia, at Alexandria.
Oren R. Lewis, District Judge.

(Argued November 8, 1976
Decided November 26, 1976.)

Before WINTER, CRAVEN and BUTZNER,
Circuit Judges.

Edward DeV. Burn for Appellant; John M. Mahoney,
Attorney, Securities and Exchange Commission (David
Ferber, Solicitor to the Commission on brief) for
Appellees.

PER CURIAM:

After careful examination of the briefs and after hearing and considering oral argument, we are convinced that the appeal is wholly without merit; and the decision below will be

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 75-233-A

STRASBURG REALTY, INC.,

Plaintiff

v.

SECURITIES AND EXCHANGE
COMMISSION, *et al.*,

Defendants

ORDER

This cause came on to be heard on the defendants' motion to dismiss the amended complaint and upon argument of counsel.

The amended complaint does nothing more than make the members of the Securities and Exchange Commission and of the State Corporation Commission

parties defendant — There is no allegation that they acted beyond the scope of their official duties.

Judge Bryan dismissed the complaint on July 25, 1975 — The plaintiff has cited no authorities indicating that that decision was not justified — Therefore the motion for dismissal of the amended complaint ought to likewise be granted, and

It Is So Ordered.

It appears from the affidavits and counter affidavits that the Securities and Exchange Commission has returned all of the plaintiff's original papers — Nothing further remaining to be done herein, this case is stricken from the docket.

The Clerk will send a copy of this order to all counsel of record.

/s/ Oren R. Lewis

United States Senior Judge

January 23, 1976

COMMONWEALTH OF VIRGINIA

[SEAL]

Lewis W. Brothers, Jr.
Director

1300 Travelers Building
Richmond, Virginia 23219
Telephone: (804) 770-7751

STATE CORPORATION COMMISSION
DIVISION OF SECURITIES AND RETAIL
FRANCHISING

December 13, 1974

Mr. Edward DeV. Bunn
Strasburg Realty, Inc.

4a

102 Massanutten Street
Strasburg, Virginia 22657

Re: Strasburg Realty, Inc.

Dear Mr. Bunn:

The following will serve to confirm division policy regarding certain books and records previously obtained from your company in connection with our investigation.

If you will recall during a meeting at this office on October 16, 1974, as previously agreed, the minute book and check book of Strasburg Realty, Inc. were made available and you refused to sign a receipt acknowledging the records were being returned in good order.

In addition, the books and records of Strasburg Realty, Inc. which have been turned over to this office pursuant to the Commission's order dated August 29, 1974 cannot be returned until our files in this matter have been closed. However, current records which are needed in the day to day operation of the company are available to you upon request and proper execution of a receipt.

I trust the above will outline our position in the matter.

Very truly yours,

/s/Lewis W. Brothers, Jr.
LEWIS W. BROTHERS, JR.

LWB, jr/bs

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CONSTITUTIONAL PROVISIONS INVOLVED

[Amendment IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

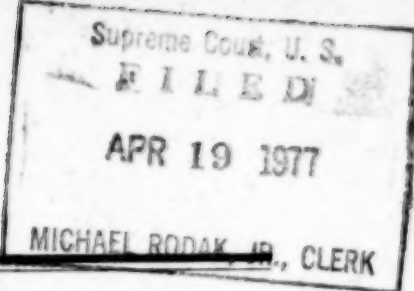
[Amendment V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[Amendment XIV]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No. 76-1175



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SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

**MEMORANDUM FOR THE FEDERAL
RESPONDENTS IN OPPOSITION**

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

DAVID FERBER,
Solicitor to the Commission,

IRVING H. PICARD,
Assistant General Counsel,

JOHN M. MAHONEY,
Attorney,
Securities and Exchange Commission,
Washington, D.C. 20549.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1175

STRASBURG REALTY, INC., PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

**MEMORANDUM FOR THE FEDERAL
RESPONDENTS IN OPPOSITION**

I. A. On December 24, 1974, the Securities and Exchange Commission authorized an investigation into the activities of petitioner Strasburg Realty, Inc. ("Strasburg"), and others, in order to determine the existence of possible violations of the registration¹ and antifraud² provisions of the federal securities laws (SEC App. 12-14).³

¹Sections 5(a) and 5(c) of the Securities Act of 1933, 48 Stat. 77, as amended, 15 U.S.C. 77e(a) and 77e(c).

²Section 17(a) of the Securities Act of 1933, 48 Stat. 84, as amended, 15 U.S.C. 77q(a); Section 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U.S.C. 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. 240.10b-5.

³"SEC App." refers to the Commission's, and "Stras. App." to petitioner's separate appendices in the court of appeals. Copies of these appendices are being lodged with the Clerk of this Court.

from it. The district court further directed that "[u]pon return to Strasburg of such books and records, if any, the portion of the Complaint in this action demanding the return of Strasburg's books and records shall be dismissed at moot" (SEC App. 36).

In response to the district court's order, the Commission's staff searched its investigatory files and, on August 13, 1975, sent to Strasburg's president several documents (Stras. App. 5-6; SEC App. 37-38), which its staff had not considered "records."⁹

Strasburg then filed an amended complaint naming as defendants the five incumbent members of the Securities and Exchange Commission, and seeking money damages (Stras. App. 20-30). The Commission again moved to dismiss or for summary judgment.

Strasburg subsequently filed a document entitled "Property Not Returned by the Securities and Exchange Commission As Ordered by the Court on August 5, 1975," in which it listed seven items that allegedly had not been returned (Stras. App. 7). In response, the Commission on November 3, 1975, filed an affidavit of one of its officers conducting the investigation, specifying the date and manner in which each of these seven items had been returned to Strasburg (SEC App. 40-43).

The district court then dismissed the amended complaint, holding (Pet. App. 2a-3a):

⁹In addition to copies of five pieces of sales materials used by Strasburg (Stras. App. 5; SEC App. 38), there were a copy of a letter Strasburg's president had written to the Commission's Washington Regional Office and three copies of other correspondence that Strasburg's president had specifically stated "could be retained" by the Commission's Washington Regional Office (SEC App. 38).

The amended complaint does nothing more than make the members of the Securities and Exchange Commission and of the State Corporation Commission parties defendant—There is no allegation that they acted beyond the scope of their official duties.

Judge Bryan dismissed the [original] complaint on July 25, 1975—The plaintiff has cited no authorities indicating that that decision was not justified * * *.

With respect to the allegation that the Commission had failed to return all of Strasburg's books and records, the court found (Pet. App. 3a):

It appears from the affidavits and counter affidavits that the Securities and Exchange Commission has returned all of the plaintiff's original papers—Nothing further remaining to be done herein, this case is stricken from the docket.¹⁰

The court of appeals affirmed *per curiam*, stating that "[a]fter careful examination of the briefs and after hearing and considering oral argument, we are convinced that the appeal is wholly without merit * * *" (Pet. App. 2a).

2. Petitioner concedes (Pet. 5) that the Commission is empowered to issue subpoenas in the administration of the federal securities laws, and the affidavit of a Commission official showing that the investigation was conducted for a legitimate purpose¹¹ is unrefuted (SEC App. 1-35).

¹⁰Petitioner indicates that the court erred in stating that it filed a counter affidavit (Pet. 5). The district court apparently referred to petitioner's document entitled "Property Not Returned by the Securities and Exchange Commission As Ordered by the Court on August 5, 1975" (Stras. App. 7).

¹¹Petitioner contends (Pet. 4-5) that the Commission acted in concert with the Virginia State Corporation Commission in holding its business records for an unreasonable period, but that contention is not supported

Moreover the record demonstrates, in three detailed affidavits, that the Commission's investigating officers returned within a reasonable period all of the petitioner's records (SEC App. 1-35, 37-38, 40-50), in some instances hand-delivering them to petitioner's president on the very day of their receipt (SEC App. 5-6, 37, 40). Petitioner did not controvert these affidavits other than by unsupported general assertions. This is insufficient.¹²

Petitioner asserts (Pet. 6-7) that it may recover damages from the individual members of the Commission, even if they were acting in good faith. The district court correctly observed that the amended complaint (Stras. App. 20-30) contains no allegations that the members of the Commission acted beyond the scope of their official duties (Pet. App. 2a-3a). Cf. *Barr v. Matteo*, 360 U.S. 564. With respect to the unnamed members of the Commission's staff who conducted the investigation into petitioner's sales activities, and for whose conduct the petitioner alleged the individual members of the Commission were responsible, the district

in the record other than by general allegations in the complaint and amended complaint. See note 12, *infra*.

On January 5, 1976, the Commission instituted an action for injunctive and ancillary relief in the United States District Court for the Eastern District of Virginia, *Securities and Exchange Commission v. Landahl, Brown & Weed, et al.*, No. 76-5-A. After certain defendants consented to the entry of final judgments of permanent injunction without admitting or denying the allegations in the complaint and to the appointment of a receiver, the district court dismissed the action against the remaining defendants, one of which was petitioner. An appeal from that decision is pending, *Securities and Exchange Commission v. First Fidelity Corp., et al.*, C.A. 4, No. 76-1828.

¹²Fed. R. Civ. P. 56(e) provides: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

court had previously stated from the bench on July 25, 1975, that there was "no allegation of any defective procedurally due process methods being used in the investigation" (note 8, p. 3, *supra*). Cf. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F. 2d 1339 (C.A. 2).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DAVID FERBER,
Solicitor to the Commission,

IRVING H. PICARD,
Assistant General Counsel,

JOHN M. MAHONEY,
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APRIL 1977.